attorney, has often been discussed in Courts of justice, and many cases are to be found in which distinctions, of more or less importance, have been taken. But in none of them is it held, that an attorney who is clothed with no other authority than what is incident to his retainer, can compromise and discharge the claim. We find no reported case where the principles are discussed so elaborately and satisfactorily, as by Ch. J. Hosmer, in *Brackett* vs. *Norton*, 4 Conn. R. 517. To those who wish to prosecute this enquiry further, we refer to *Smith* vs. *Bossard*, 2 McCords, Ch. R. 409; *Gaillard* vs. *Smart*, 6 Cowen, 385; *Cheever* vs. *Merrick*, 2 N. Hamp, 376; *Lewis*, admx. vs. *Gamage*, 1 Pick. 347; *Huston* vs. *Mitchell*, 14 S. & R. 307; *Kellogg* vs. *Gilbert*, 10 Johns R. 220; *Commissioners of Accounts* vs. *Rose*, & al. 1 Desaus. 469; *Gorham* vs. *Gale*, 7 Cowen, 739; *Richardson* vs. *Talbot*, 2 Bibb, 382; *Gray* vs. *Wass*, 1 Greenl. 257; *Holker* vs. *Parker*, 7 Cranch, 436. *Lambert* vs. *Sanford*, 2 Blackf. 137; *Herbert* vs. *Alexander*, 2 Call, 498; *Vail* vs. *Conant*, 15 Verm. 314; *Sharp* vs. *Grey*, 9 Bing, 457; (23 E. C. L. 331.)

The other Judges were of the same opinion.

New trial advised.

In the Supreme Court of Ohio, January Term, 1853.

CHASE, ET. AL., *vs.* WASHBURN.

1. In case of a regular deposit of wheat with a warehouseman, a liability for the value of the wheat is incurred by the depositary, in case he mixes it with other wheat in his warehouse, and ships the same on his own account, notwithstanding he may supply the place of the depositor's wheat by other wheat procured and deposited in his warehouse: and the destruction, by accident, of the warehouse, and the wheat supplied to take the place of the depositor's wheat, will not protect the depositary from this liability to the depositor.
2. In case of an irregular deposit, or mutuum, where the obligation imposed on the depositary, or mutuary, is to re-deliver, not the specific thing furnished, but another article of the same kind and value; or, where the depositary has the *option* to return the *specific article* received, or another of the *same kind and value*, in either case the property passes to the depositary, as fully as in a case of ordinary sale or exchange, and the risk of loss by accident follows the control or dominion over the property.

3. Where a warehouseman receives wheat, and by the consent of the owner, or in accordance with the custom of trade, mixes the wheat in a common mass with other wheat in his warehouse, with the understanding that he is to retain or ship the same for sale, on his own account, at pleasure; and, on presentation of the warehouse receipt, is either to pay the market price thereof in money, or re-deliver the wheat, or other wheat in place of it, the transaction is not a bailment, but a sale, and the property passes to the depositary, and carries with it the risk of loss by accident.
4. A custom, when fully established, becomes the law of the trade in reference to which it exists; and it will be presumed that the parties intended to conform to it, when they have been silent on the subject.

This is a writ of error to reverse a judgment of the Huron County Common Pleas, rendered at the October Term, A. D. 1851. The original action was assumpsit, in which the plaintiff, Washburn, sought to recover the value of a quantity of wheat, which had been delivered by him to the defendants, Chase & Co., as warehousemen engaged in the produce business at the village of Milan, in said County.

It appears, from the bill of exceptions taken in the case, that on the trial of the cause in the Common Pleas, Washburn offered in evidence sundry warehouse receipts, given him by Chase & Co., for wheat delivered at various times, between the month of October, 1847, and the month of August, 1849, amounting in the aggregate to six hundred bushels and more. The receipts are similar in form and effect, and the first in date, which may be taken as a sample of the others, is as follows:—

"*Milan, Ohio, Nov.* 5, 1847.

"Received in store, from J. C. Washburn (by son), the following articles, to wit: thirty bushels of wheat.

"H. CHASE & CO."

It further appears, that the agent of Washburn was introduced as a witness, who testified that he had been instructed by Washburn, the defendant in error, when he delivered the first load of the wheat, not to sell the wheat for less than one dollar per bushel, and, if he could not get that, to leave it in store with Chase & Co., the plaintiffs in error, and that he told Chase that Washburn had

five or six hundred bushels to draw, and that Chase, at the time, told the agent, when he left the first load, that they (Chase & Co.) would pay the highest price when Washburn should call for it. The wheat was, accordingly, from time to time delivered; and, in May, 1850, a demand was made for either the wheat or the money, and both refused.

Chase then offered evidence, tending to prove that his warehouse was burnt on the night of the 26th of October, 1849, and that there was then consumed in it, sufficient wheat to answer all his outstanding receipts. He also offered evidence, tending to prove that the "custom at Milan" was to store all wheat received in a "*common mass*," and to ship from the same as occasion required; and that this custom was understood by Washburn; also that the custom was, when parties called for their pay, either to pay the highest market price, or deliver wheat to the holder of the receipt.

Washburn then offered rebutting evidence, tending to prove that Chase had not sufficient wheat in his warehouse, at the time of the fire, to answer all his outstanding receipts, and also that the warehouse was emptied of all wheat, between the date of the last receipt given Washburn and the time of the fire.

Upon this state of facts, the counsel for Chase asked the Court to charge the jury, "that the *customs at Milan*, if known to Washburn, in the absence of an *express contract*, became a part of the contract between the parties; and, if the jury should find that Chase had sufficient wheat on hand (at the time of the fire) to answer all his outstanding receipts, that he was not liable in this action, and that neither the *mingling* of the wheat, nor the *shipment* of it, would make Chase liable, if he had a sufficient amount on hand, at the time of the fire, to answer his outstanding receipts."

The Court, however, refused to charge as requested. The bill of exceptions sets out the charge of the Court in full, to which the counsel for the defendants below excepted. The verdict and judgment was in favor of the plaintiff below, to reverse which this writ of error is brought.

The errors assigned are the following, to wit:—That there is error:

First.—Because the Court charged the jury, "That if they should find that the wheat was received and put in mass with other wheat of defendant and that received of other persons, with the understanding that the wheat was to be at the disposal of the defendant, either to retain or to ship it, and with the agreement that when the receipts were presented, the defendant would either pay the market price therefor, or re-deliver the wheat, or other wheat equal in amount and quality—then, if the jury should further find that the wheat thus left prior to the fire had all been shipped and disposed of, the defendant cannot be excused unless there was an agreement between the parties, that the wheat subsequently purchased by the defendant was to be substituted in place of that left by plaintiff, and to be his property."

Second.—Because the Court charged the jury as follows: "Where a warehouseman receives grain on deposit, with an understanding that he may, if he choose, dispose of it—that he will, when demanded, return other grain or pay for it, in case of such a disposition he is bound to do one or the other. A subsequent purchase of grain by the warehouseman, for the purpose of meeting the demand for grain thus received, would not be sufficient to vest the property in the plaintiff."

Third.—Because the Court refused to charge the jury that the custom at Milan, as proved by defendant, if known to plaintiff, was a part of the contract between the parties.

Osburn and *Taylor*, attorneys for plaintiff.

Worcester and *Pennewell*, attorneys for defendant.

BARTLEY, C. J.—To determine which of the parties in this case shall sustain the loss of the property in question occasioned by the accident, it becomes necessary to ascertain the true nature and character of the transaction between the parties, and the rights created and duties imposed thereby. It was either a contract of sale, a mutuum, or a deposit. If a contract of sale, the right of property passed to the purchaser on delivery, and the article was thereafter held by him at his own risk. If a mutuum, the absolute property passed to the mutuary, it being a delivery to him for consumption or appropriation to his own use, he being bound to restore not the

same thing, but other things of the same kind. Thus it is held, that if corn, wine, money, or any other thing which is not intended to be delivered back, but only an equivalent in kind, be lost or destroyed by accident, it is the loss of the borrower or mutuary; for it is his property, inasmuch as he received it for his own consumption or use, on condition that he restore the equivalent in kind. And in this class of cases the general rule is, "*Ejus est periculum cujus est dominium.*" (Story on Bail, sec. 283; Jones on Bail, 64; 2 Raym. 916.) But if the transaction here was a deposit, the property remained in the bailor, and was held by the bailee at the risk of the bailor, so long as he observed the terms of the contract in so doing. But if the bailee shipped the wheat, and appropriated the same to his own use, in violation of the terms of the bailment, before the burning of his warehouse, he became liable to the bailor for the value of the property.

What then was the real character of the transaction between the parties? The receipt I suppose to be in the ordinary form of warehouse receipts, and such as would be proper to be delivered by a warehouse depositary of wheat, to the owner, upon its being received into a warehouse for temporary safe-keeping, and to be re-delivered to the owner on demand. The obligation or contract which the law would imply as against the warehouseman, on the the face of such a receipt, would be that he should use due diligence in the care of the property, and that he should re-deliver it to the owner, or to his order, on demand, upon being paid a reasonable compensation for his services; and if the warehouseman, under such circumstances, should, without the consent of the owner, mix the wheat with other wheat belonging to himself, or wheat of other persons, and ship the same to a foreign market, for sale, he would be liable to the owner for the value of the wheat thus deposited with him.

The receipts themselves are silent as to the *time* the wheat was to be kept, the *price* to be paid for its custody, *when* or *how* to be paid, *whose property* it was to be after delivery into the warehouse, and what disposition was to be made of it. But it is claimed that inasmuch as written receipts, whether for money or other property,

are always subject to explanation by parol, that the terms on which this wheat was delivered can be explained by the declarations of the parties at the time of the delivery of the first load of wheat, and also by the custom of trade which prevailed among warehousemen at Milan, and that by such explanation it is shown, that the real transaction was, that the wheat was received, and with the consent of the depositor, put in mass with other wheat of the warehouseman and that received of other persons, with the understanding that the wheat was to be at the disposal of the warehouseman, either to retain or to ship it, and that when the receipts should be presented by the depositor, the warehouseman should either pay the market price therefor, or re-deliver the wheat or deliver other wheat equal in amount and quality.

If these terms were incorporated into the contract they could not have excused the liability of the warehouseman in this case. The distinction between an irregular deposit, or a mutuum, and a sale, is sometimes drawn with great nicety; but it is clearly marked and has been settled by high authority. In case of a regular deposit, the bailee is bound to return the specific article deposited; but where the depositary is to return another article of the same kind and value, or has an option to return the specific article, or another of the same kind and value, it is an irregular deposit or mutuum, and passes the property as fully as a case of ordinary sale or exchange. Sir William Jones says, "It may be proper to mention the distinction between an obligation to restore the *specific things*, and a *power* or *necessity* of *returning others of equal value.* In the first case, it is a regular bailment; in the second, it becomes a debt." In the latter case he considers the whole property transferred.

Judge Story, in his Commentaries on the Law of Bailment, says, sec. 439, "The distinction between the obligation to restore the specific things, and the obligation to restore other things of the like kind and equal in value, holds in cases of hiring, as well as in cases of deposits and gratuitous loans. In the former cases, it is a regular bailment; in the latter, it becomes a debt or innominate contract. Thus, according to the famous law of Alfenus, in the

Digest, "if an ingot of silver is delivered to a silversmith to make an urn, the whole property is transferred, and the employee is only a creditor of metal equally valuable, which the workman engages to pay in a certain shape, unless it is agreed that the specific silver, and none other, shall be wrought up into the urn."

In all this class of cases, the risk of loss by unavoidable accident, attaches to the person who takes the control or dominion over the property. When, therefore, Washburn's wheat was delivered to Chase & Co., and became subject to their disposal either to retain or ship it on their own account, the property passed, and the risk of loss by accident, followed the dominion over it.

The doctrine here adopted, was at one time somewhat obscured by the opinion of Chief Justice Spencer, in the case of *Seymours* v. *Brown and others*, (19 John, Rep. 44,) in which the Court decided that where the plaintiff delivered wheat to the defendants, on an agreement that for every five bushels of wheat the plaintiffs should deliver at the defendants' mill, they (the defendants) would deliver in exchange, one barrel of flour, was a bailment, *locatis operis faciendi;* and the wheat having been consumed by fire through accident, the defendants were not liable on their agreement, to deliver the flour. This decision, however, was disapproved of by Chancellor Kent, as not being conformable to the true and settled doctrine laid down by Sir William Jones, who has been styled the great oracle of the law of bailment, 2 Kent's Com. 464. And the decision has been distinctly over-ruled by repeated subsequent adjudications in the State of New York. *Hurd* v. *West*, 7 Cowen, 752; *Smith* v. *Clark*, 21 Wend. 83; *Norton* v. *Woodruff*, 2 Comstock, 153; *Mallory* v. *Willis*, 4 Comstock, 77, and *Pierce* v. *Skenck*, 3 Hill R., 28.

The same doctrine has been affirmed in the case of *Barker et al.*, v. *Roberts*, 8 Greenleaf's R. 101, and also *Ewing* v. *French*, 1 Blackford, R. 354. In the latter case, a quantity of wheat having been delivered by the plaintiff to the defendants at their mill, to be exchanged for flour, and the defendants having put the wheat into their common stock of wheat, the mill with the wheat was afterwards casually destroyed by fire. The Court held that the de-

fendants were liable for a refusal to deliver the flour. If in that case the agreement of the parties had been that the flour to be furnished should be the flour which should be manufactured from the specific wheat delivered, instead of an exchange of wheat for flour, it would have been a bailment, and the loss would have fallen upon the plaintiff.

In the case of *Buffum* v. *Merry*, 3 Mason R., 478, where the plaintiff had delivered to the defendant, cotton yarn, on a contract to manufacture the same into cotton plaids, and the defendant was to find the filling and to weave so many yards of plaids at eighteen cents per yard, as was equal to the value of the yarn at sixty-five cents per pound, it was held to be a sale of the yarn, and that by the delivery of it to the defendant, it became his property, and he was responsible for the delivery of the plaids, notwithstanding the loss of the yarn by an accidental fire. But had the plaintiff and the defendant agreed to have the particular yarn, with filling to be found by the defendant, made into plaids on joint account, and the plaids, when woven, to be divided according to their respective interests in the value of the materials, but before the division, the plaids had been destroyed by accident, the loss in the opinion of Judge Story, would have been mutual, each losing the materials furnished by himself.

The case of *Slaughter* v. *Green et al.*, 1 Randolph, R. 3, and also the case of *Inglebright* v. *Hammond*, 19 Ohio Rep. 337, are relied upon as sustaining the plaintiffs in error. These two cases, on examination, do not sustain the doctrine of the case of *Seymours* v. *Brown*, above referred to in 19 John's Rep. On the contrary, instead of an exchange of wheat for flour in each of the cases, by the express terms of the contract, the flour to be returned was to be manufactured out of the wheat furnished. In the former case, the written receipts given for the wheat, expressly provided, "*that it is received to be ground*," which excludes the idea of passing the ownership to the miller. And in the latter case, it was also expressly provided by the agreement, that the flour in controversy was "*to be made out of the wheat furnished by Hammond*," and "*the flour made therefrom was to be delivered at Steubenville, for*

said Hammond's use." In both these cases, therefore, the limitation in the agreement of the parties, imported a bailment, and not an exchange for flour. And this character of the transaction is not lost, either because the custom of the country in reference to which the wheat was received, warranted the mixing of it with the wheat of others received on like terms; or because by the express consent of the parties, the wheat was mixed with other wheat in the mill, belonging to the miller himself. When the owners of wheat consent to have their wheat, when delivered at a mill or a warehouse, mixed in a common mass, each becomes the owner in common with the others of his respective share in the common stock. And this would not give the bailee any control over the property, which he would not have, if the wheat of each one was kept separate and apart. If the wheat, thus thrown into a common mass, be delivered for the purpose of being converted into flour, each owner will be entitled to the flour manufactured from his proper quantity or proportion in the common stock. If a part of the wheat held in common, belong to the bailee himself, he could not abstract from the common stock any more than his own appropriate share, without a violation of the terms of the bailment, and such a breach of his engagement could not be cured by his procuring other wheat, to be delivered to supply the place of that thus wrongfully taken. But if the wheat be thrown into the common heap, with the understanding or agreement, that the person receiving it, may take from it at pleasure, and appropriate the same to the use of himself or others, on the condition of his procuring other wheat to supply its place, the dominion over the property passes to the depositary, and the transaction is a sale, and not a bailment.

It is claimed that the Court of Common Pleas erred in refusing to charge the jury as requested, "that the customs among warehousemen at Milan, in the absence of an express contract, if known to Washburn, became a part of the contract."

A custom, it is true, is not admissible, either to contradict or alter the terms or legal import of a contract, or to change the title to property, by varying a general rule of law. But a custom when

fully established, becomes the law of the trade in reference to which it exists; and the presumption is that the parties intended to conform to it, when they have been silent on the subject. Its office is to interpret the otherwise indeterminate intentions of the parties, and to ascertain the nature and extent of their contracts, arising, not from express stipulations, but from mere implications and presumptions, and of acts of doubtful and equivocal character, I am not prepared to say that the "*customs at Milan*," if fully established, and known to both the parties, to a contract for the delivery of wheat to a warehouseman, may not be regarded as law as well as the customs of London or of Kent. But unfortunately for the plaintiffs in error, the "customs at Milan," as the evidence tended to prove, according to the Bill of Exceptions, very clearly showed the transaction between the parties in this case, to be a contract of sale, and not a bailment. Had the Court, therefore, charged as requested upon this point, it could not have aided the defence set up against the action. So that if the Court did err in in this particular, no injury was thereby done to the plaintiffs in error.

The judgment of the Court of Common Pleas affirmed.

In the Supreme Court of New Jersey.

CATHARINE MURRAY, *vs.* THE NEW JERSEY RAILROAD AND TRANSPORTATION COMPANY.[1]

1. The Court will order the *venue* changed, even when laid in the proper county, if it appears that a fair trial cannot be had there.

2. In order to warrant a change of *venue*, it must appear that a fair trial cannot be had in the county where it is laid by positive evidence or facts, and not by the mere opinion of the witnesses.

This was an action on the case, by the plaintiff, for negligence in the management of the ferry of the defendants, by means whereof the plaintiff was injured, and lost one of her limbs.

[1] We are indebted to A. O. Zabriskie, Esq., the State Reporter, for this case, who has obligingly furnished us with the sheets of 3 Zab., in advance of publication This case will be found reported in 3 Zab., p. 63, which is not yet published.